Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

THE STATE OF ARIZONA,

PETITIONER,

-vs-

SHIRLEY AVERYT and ROBERT AVERYT,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Arizona Court of Appeals err, as a matter of federal constitutional law, by holding that *Lambert v. California*[1] requires, as a matter of due process, that the state prove that the defendant knew he had a legal duty to file a state income tax return?

2. Did the Arizona Court of Appeals err, as a matter of federal constitutional law, by holding that *Cheek v. United States*[2] requires a state trial court to allow the defendant to present a "good-faith" defense in a prosecution for failure to file a state income tax return?

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[1] 355 U.S. 225 (1957)

[2] 498 U.S. 192 (1991)

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OPINIONS BELOW

The State of Arizona seeks review of the Arizona Court of Appeals' opinion filed on March 8, 1994, which reversed Respondents' convictions for failure to file state income tax returns for 3 consecutive calendar years on the basis that the trial court's instructions and rulings were reversible error under *Lambert v. California* and *Cheek v. United States*. That opinion is reported at 876 P.2d 1158, and is attached hereto as Appendix A.

STATEMENT OF JURISDICTION

The opinion of the Arizona Court of Appeals was filed on March 8, 1994. (Appendix A.) The State of Arizona filed a petition for review to the Arizona Supreme Court, which was granted on July 11, 1994. However, after hearing oral argument on November 3, 1994, the Arizona Supreme Court determined that it had improvidently granted the petition and denied the petition for review on November 4, 1994. (Appendix B). *See also* 884 P.2d 693. This present petition for writ of certiorari was filed on February 2, 1995, within 90 days of the Arizona Supreme Court's order denying the petition for review.

This Court has jurisdiction to review the opinion of the Arizona Court of Appeals pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the acused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> [N]o state shall make or enforce any law. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

STATUTORY PROVISIONS INVOLVED

The pertinent part of the criminal tax statute, A.R.S. § 42-137(B) provides as follows:

> It is a class 5 felony to . . . [k]nowingly fail to file a return . . .

The pertinent part of the Arizona Revised Statutes defining the mental state of knowingly, A.R.S. § 13-105(6)(b), provides as follows:

> "Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that his or her conduct is of that nature or that the circumstance exists. It does not require any knowledge of the unlawfulness of the act or omission.

The pertinent part of the Arizona Revised Statutes discussing the effect of ignorance or mistake of law upon criminal liability, A.R.S. § 13-204(B), provides as follows:

> Ignorance or mistake as to a matter of law does not relieve a person of criminal responsibility.

STATEMENT OF THE CASE

On September 16, 1991, the State charged Respondents, Robert Hamilton Averyt and Shirley Ann Averyt, with three counts of failure to file personal income tax returns, class 5 felonies. Respondents were tried together in a 2-day trial beginning on January 23, 1992. The evidence produced at trial was as follows, viewed in the light most favorable to sustaining the convictions and resolving all conflicts of evidence and all reasonable inferences therefrom against Respondents.[3]

The Averyts moved to Arizona from Nevada in February 1986. They filed, 1 day late, an Arizona state income tax return for 1986. They had filed a federal income tax return in 1985.

In 1987, Robert filed a W-4 form indicating that he wanted to be exempt from withholding. However, he was, in fact, not entitled to be exempt from withholding because he had a tax liability in 1986. In 1987, Robert worked for Arizona Communities Corporation and for Realty World.

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[3] *Jackson v. Virginia*, 443 U.S. 307, 320 (1979).

Shirley worked for Mervyn's and for B & G Realty in 1987. That year, she also obtained her real estate license and she and Robert then worked together as a real estate "team" at Realty World.

Respondents' combined gross income in 1987 was at least $57,000. An Arizona resident must file an income tax return if his gross income for the year is $5,000 or more. Respondents did not file either a federal or an Arizona income tax return for 1987. They did not request an extension.

In 1988, Robert and Shirley worked for Coldwell Banker, selling real estate as a team. However, the commissions were usually in Robert's name. Robert also was paid in 1988 by the Arizona Communities Corporation, Realty World, and Dave Brown Homes. Respondents' combined gross income in 1988 was at least $103,000. They did not file either a federal or an Arizona income tax return for 1988. They did not request an extension.

Respondents purchased a house in Arrowhead Ranch for $136,000. Their mortgage payments were approximately $1,250 per month.

In 1989, Robert was paid by Coldwell Banker and B & G Realty. Respondents had at least $60,000 combined gross income in 1989. They did not file either a federal or an Arizona income tax return for 1989. They did not request an extension.

Respondents joined the Arrowhead Ranch Country Club in February 1990. Shirley and Robert played golf at the Country Club. It cost $9,500 to join the club, and monthly fees were $130. Respondents sent their children to private school for a while.

In 1991, Robert was president of Dynamite Realty, and owned 49% of the stock. The Arizona Department of Revenue (ADOR) received a complaint call regarding Respondents. ADOR criminal investigator Tamara Harris discovered that Respondents had not filed Arizona or federal income tax returns for 1987, 1988, and 1989, and had not requested extensions for those years.

Harris and fellow ADOR investigator, Gary Mengel, interviewed Robert at the offices of Dynamite Realty on February 6, 1991. They told Robert that they were investigating the Averyts for criminal violations of Arizona tax laws in tax years 1987 to 1989. Robert agreed to talk to them. Robert said that they might have

filed a state return in 1987. He admitted they had not filed a state return for 1988 or 1989, even though he knew that they were required to file the returns. He also admitted that they had not filed federal income tax returns for 1987, 1988, or 1989. Robert said that he could not prepare the returns because of some complicated real estate transactions, and that he did not have enough money to hire an accountant. Robert verified gross income of at least $57,000 for 1987, $103,900 for 1988, and $60,800 for 1989. Robert admitted that he knew they had taxes due of between $3,000 and $13,000 for the years of 1988 and 1989.

Harris and Mengel interviewed Shirley on February 12, 1991, at the Dynamite Realty office. Shirley told them that, since Respondents were married, she had maintained the records for the tax returns, while Robert had actually prepared the returns. She said they had no complicated real estate transactions in 1987, so she did not know why they did not file a return for 1987, except that they probably owed taxes. She admitted that they had not filed any returns for 1987, 1988, and 1989. Shirley admitted that both she

and Robert realized that they were required to file returns for those years.

After their interviews with the ADOR investigators, but prior to the filing of the indictment on September 16, 1991, Respondents filed a joint state income tax return for 1987. Respondents filed a motion to dismiss the indictment 3 days after they filed returns for 1988 and 1989. At the time of trial, ADOR had not yet completed an audit on the 1987 return, but a computer check of the return indicated that Respondents had understated their tax liability for that year on the return, and were not entitled to a refund.

The jurors returned verdicts of guilty on all three counts against both Respondents. The trial court sentenced both Respondents to 3 years on probation and included as a term of probation that each spend 12 months in jail. The trial court staggered the jail terms so that Robert would finish his jail term before Shirley began hers.

Respondents then filed an appeal to the Arizona Court of Appeals from their convictions. Attorney Barry Becker,

representing both Respondents, filed separate opening briefs that were virtually identical, raising the same three issues:

A. Did the trial court err in determining that Appellants could be guilty of the crime of failure to file a tax return as set forth in A.R.S. § 42-137, even though Appellants filed their tax returns after the due date of the return?

B. Did the trial court err in determining that the crime requires only that the defendant know that the return was not filed on the due date?

C. Is A.R.S. § 42-137(B) void for vagueness as it relates to the crime of failure to file a tax return?

Petitioner requested that the court of appeals consolidate the appeals; the court did so, and Petitioner filed a consolidated answering brief on March 23, 1993. Amicus Arizona Attorneys for Criminal Justice requested permission to file an amicus brief, which

was granted on October 14, 1993. Amicus also requested oral argument, although neither party had requested oral argument, and the court granted oral argument by order dated October 21, 1993.

The amicus brief raised two issues:

A. Is a defendant's good faith misunderstanding of the law a defense in a criminal tax prosecution?

B. Can a defendant be convicted of failing to file a tax return in violation of A.R.S. § 42-137(B) only if he willfully or intentionally violated his known duty?

Petitioner filed an answering brief, Amicus filed a reply brief, and oral argument was held on January 4, 1994.

The court of appeals filed an opinion on March 8, 1994, reversing the convictions and remanding for a new trial. (Appendix A at 1.) The court first addressed Respondents' constitutional attacks on the statute. It found that criminal liability for the crime attaches, for calendar-year taxpayers, when the return is not filed on or before the 15th day of April following the close of the calendar

year, rejecting Respondents' argument that the Arizona statutes did not give them fair warning of the due date for their tax returns. (Appendix A at 6–9.)

The court also held that the statute is not unconstitutionally vague with regard to the applicable mental state, "knowingly." (Appendix A at 9–15.) It found that Respondents did not have standing to assert various hypothetical applications of the statute. (Appendix A at 9–10.) The court then, at some length, traced the history of the Arizona failure to file statute, found that the Legislature had consciously changed the mental state of the statute from "willfully" to "knowingly," and rejected Respondents' and Amicus' attempts to have the court redefine the mental state contained in the statute. (Appendix A at 11–14.)

The court held, however, that the due process clause of the federal constitution required that the state prove, as an element of the crime, that Respondents knew of their legal duty to file an income tax return, citing *Lambert v. California*. (Appendix A at 15–19.) The court reasoned that the crime was one of omission, and that merely earning income was not such an activity as to alert

Respondents that they had to file an income tax return. (Appendix A at 18.) The court concluded that, because the trial court had failed to instruct the jurors on this requirement, it had committed reversible error, not subject to a harmless error analysis. (Appendix A at 19.)

Finally, the court ruled that, upon retrial, the trial court had to allow Appellants to raise the *defense* that their returns were too difficult to file, and allow them to introduce evidence in support of that defense. (Appendix A at 20–21.) It stated, "Preventing the jury from considering evidence which might negate the *mens rea* of the crime would seriously undermine the protections embodied within the sixth amendment's jury trial provision," citing *Cheek v. United States*. (Appendix A at 20.) Again citing *Cheek*, the court noted that, "It is not beyond the realm of possibility 'for a defendant to be ignorant of his duty based on an irrational belief that he has no duty.'" (Appendix A at 20.) The court reversed Appellants' convictions and sentences and remanded for a new trial. (Appendix A at 21.)

After originally granting the petition, and hearing oral argument, the Arizona Supreme Court later determined that it had improvidently granted the petition and denied the petition for review. (Exhibit B).

ARGUMENTS

I

THE ARIZONA COURT OF APPEALS ERRED, AS A MATTER OF FEDERAL CONSTITUTIONAL LAW, BY HOLDING THAT *LAMBERT V. CALIFORNIA* REQUIRES, AS A MATTER OF DUE PROCESS, THAT THE STATE PROVE THAT THE DEFENDANT KNEW HE HAD A LEGAL DUTY TO FILE A STATE INCOME TAX RETURN.

This case concerns the scope that the states must give, as a matter of federal constitutional law, to this Court's opinion in *Lambert v. California*. Petitioner submits that the Arizona Court of Appeals erred by determining that *Lambert* requires, in a state prosecution for failure to file a state income tax return, that the state prove that the defendant knew of his legal obligation to file the return.

In *Lambert*, this Court considered a Los Angeles city ordinance that required convicted felons to register if remaining in Los Angeles for a period of more than 5 days, or if living outside of the city but coming into it on five occasions within a 30-day period. 355 U.S. at 226. The ordinance set forth no mens rea, and the California courts had not read any into it. *Id.* at 227. This Court

recognized that the concept "ignorance of the law will not excuse" is one "deep in our law." *Id.* at 228. However, it also considered the due process principle of notice, which it borrowed from civil law. *Id.* The Court found due process applied when "a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case." *Id.* The Court found that the defendant was such a person, because a violation of the ordinance was "unaccompanied by any activity whatever, mere presence in the city being the test." *Id.* at 229. The Court held that, "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand." *Id.* The dissent expressed hope that "the present decision will turn out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law." *Id.* at 232. (J. Frankfurter, dissenting.)

This Court has sparingly applied *Lambert* to state prosecutions, and has indicated that its scope is limited. For example, in *Powell v. Texas,* 392 U.S. 514, 535–36 (1968), this Court stated that it "has

never articulated a general constitutional doctrine of *mens rea*," and discussed its holding in *Lambert* in a footnote. It then explained:

> The doctrines of *actus reus, mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

392 U.S. at 536. In *Texaco, Inc. v. Short,* 454 U.S. 516, 537 fn.33 (1982), this Court stated "Its [*Lambert's*] application has been limited, lending some credence to Justice Frankfurter's colorful prediction in dissent that the case would stand as 'an isolated deviation from the strong current of precedents—a derelict on the waters of the law.'"

In *United States v. Freed,* 401 U.S. 601 (1971), this Court considered whether there was a constitutionally-required scienter for possession of unregistered hand grenades. Distinguishing *Lambert*, this Court found that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act." 401 U.S. at 609. The Court ended its opinion with a quotation from *United*

States v. Balint, 258 U.S. 250 (1922), a case in which this Court had found no scienter requirement for a tax on narcotics.

The application of *Lambert* has generally been limited in the state courts to cases involving offender registration statutes. *E.g.*, *State v. Garcia* 156 Ariz. 381, 382, 752 P.2d 34, 35 (Ct. App. 1987). Attempts to expand *Lambert* beyond such cases have met with little success. In *State v. Maldanado*, 645 A.2d 1165, 1174 (N.J. 1994), the New Jersey Supreme Court rejected the application of *Lambert* in a case involving distribution of drugs:

> Thus, constitutional due process limitations on strict-liability criminal statutes apply when the underlying conduct is so passive, so unworthy of blame, that the persons violating the proscription would have no notice that they were breaking the law.

In *Galvan v. Superior Court*, 452 P.2d 930 (Cal. 1969), the California Supreme Court rejected the application of *Lambert* to a San Francisco ordinance requiring registration of guns. The court stated, "Except under the unique circumstances of *Lambert*, knowledge of the law is not a requirement of due process." 452 P.2d at 941.

This is the first time, to Petitioner's knowledge, that a state appellate court has applied the due process requirement of *Lambert* to a state failure-to-file tax prosecution. However, two federal circuit courts have held that *Lambert* does not apply to proseuctions under the federal gaming tax statute. *See Burks v. United States*, 287 F.2d 117, 125 (9th Cir. 1961), *cert. denied*, 369 U.S. 841 (1962) (*Lambert* not applicable to gaming tax—is a public welfare offense); *Biondo v. United States*, 348 F.2d 272, 274–75 (8th Cir. 1965) (following *Burks*).

Thus, neither this Court, nor any other appellate court, state or federal, has addressed the applicability of *Lambert* to state tax prosecutions. The broader question is the applicability of *Lambert* to the myriad of state statutes that criminalize acts of omission. Thus, the scope of *Lambert* is a major question in federal constitutional law.

This gap in federal constitutional law is made more obvious by the fact that this Court issued no less than four opinions in 1994 regarding the federal government's burden of proof with regard to federal crimes with the mental state of "knowingly" or "willingly."

Posters 'N' Things, Ltd. v. United States, 511 U.S. ___, 114 S. Ct. 1747, 1753 (1994) (to prove violation of Mail Order Drug Paraphernalia Control Act, the government must prove only that the defendant was aware that the items sold were likely to be used with illegal drugs); *Ratzlaf v. United States,* 510 U.S. ___, 114 S. Ct. 655, 663 (1994) (term willfully, with respect to anti-structuring provision, means that knowledge of unlawfulness of act is required—so general principle that ignorance of the law is not a defense not applicable); *Staples v. United States*, 511 U.S. ___, 114 S. Ct. 1793, 1804 (1994) (to obtain a conviction under National Firearms Act, government must prove that the defendant knew that the weapon he possessed was defined as a machine gun under the Act due to the weapon's capability to be fired automatically); *United States v. X-Citement Video, Inc.*, ___ U.S. ___, 115 S. Ct. 49 (1994) (term knowingly in Protection of Children Against Sexual Exploitation Act requires that the government prove that the defendant knew the age of the performers in the visual depiction).

Accordingly, while this Court has explained at some length the mental states applicable to various federal crimes, as a matter of

interpretation of the intent of Congress, it has not considered the extent, if any, to which the *federal constitution* requires states to recognize knowledge of the legal duty as an element of state crimes. Petitioner submits that the above opinions, and *Cheek*, only say that the intent of the legislature, whether Congress or a state legislature, controls regarding the mental state necessary to commit a particular crime. Federal due process has nothing to say on the issue, absent the extreme sort of case discussed in *Lambert*.

The Arizona Court of Appeals' opinion makes it clear that, absent any federal constitutional mandate under *Lambert*, there is no requirement for the State of Arizona to prove that the defendant actually knew he had a legal duty to file a state income tax return. The applicable mental state set forth in the Arizona failure-to-file statute is knowingly, and knowingly is defined in the definitional section of the Arizona criminal statutes such that, "It does not require any knowledge of the unlawfulness of the act or omission." A.R.S. § 13-105(6)(b). Moreover, A.R.S. § 13-204(B) explicitly provides that, "Ignorance or mistake as to a matter of law does not relieve a person of criminal responsibility."

At stake here is the validity of Arizona's statutory recognition of the well-established legal principle that ignorance of the law is no excuse and that all citizens are presumed to know the law. This Court has recognized the importance in American law of this general principle. *See United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971). The court of appeals' opinion essentially holds that the federal constitution forbids application of this legal principle *whenever the charged crime is one of omission.* Thus, the court of appeals' opinion raises a substantial question whether federal due process has eliminated the principle that ignorance of the law is no excuse, and of the ability of a state legislature to define the mental state that applies to a crime. The related question is, if the principle that ignorance or mistake of law is no excuse has eroded, has it eroded so far that it does not apply to what must be one of the most commonly-known legal duties in American society—the duty to file an income tax return.

Respondents may try to assert that Petitioner wants the statute construed as a strict-liability statute, but that is not true and is a red herring. Petitioner's position is that the applicable mental state is

"knowingly," which is the mental state that applies to a great number of Arizona crimes. It is ironic, however, to note that both this Court and other courts have upheld the constitutionality of strict-liability failure-to-file statutes—under which the defendant is liable, without further inquiry, if he has failed to file the tax return or form. *See United States v. Balint,* 258 U.S. at 253–54 (Narcotic Act tax requirement held to be a strict-liability offense); *People v. Allen*, 25 Cal. Rptr. 2d 26 (1993), *review denied,* March 2, 1994, *cert. denied,* 115 S. Ct. 74 (holding that California failure-to-file statute is a strict-liability statute and does not violate due process). In *Balint*, this Court said, "So, too in the collection of taxes, the importance to the public of their collection leads the Legislature to impose on the taxpayer the burden of finding out the facts upon which his liability depends and meeting it at the peril of punishment." 258 U.S. at 252. If the federal constitution does not preclude strict-liability for failing to file a tax return, it certainly does not require the state to prove that the defendant knew of his legal duty to file a tax return.

This Court has, *with regard to federal tax prosecutions,* interpreted the federal tax statutes and the intent of Congress such that the federal government must prove that the defendant knew of his legal duty to file a tax return. *Cheek*, 111 S. Ct. at 610. However, this Court has *never* held that, as a matter of federal due process, state tax prosecutors must prove that a state defendant knew of his legal duty to file a state income tax return. Thus, this case presents an important issue of federal constitutional law that this Court has never addressed.

II

THE ARIZONA COURT OF APPEALS ERRED, AS A MATTER OF FEDERAL CONSTITUTIONAL LAW, BY HOLDING THAT *CHEEK V. UNITED STATES* REQUIRES A STATE TRIAL COURT TO ALLOW THE DEFENDANT TO PRESENT A "GOOD-FAITH" DEFENSE IN A PROSECUTION FOR FAILURE TO FILE A STATE INCOME TAX RETURN.

The second question presented is whether *Cheek* requires, as a matter of federal constitutional law, that state failure-to-file statutes must be interpreted to allow so-called "good-faith" defenses based on the defendant's alleged ignorance of the law or mistake of law.

Petitioner has not discovered any other state court appellate opinions applying *Cheek* to state tax prosecutions.

To make state recognition of good-faith defenses a requirement of federal constitutional law would be contrary to two important principles set forth by this Court: (1) that determination of affirmative defenses is the province of the states; and (2) that ignorance or mistake of the law is no defense. Moreover, the opinion fails to recognize that *Cheek* is merely this Court's interpretation of a federal statute, not a federal constitutional mandate upon the states.

Federal due process does not require that defendants be allowed to assert *any* affirmative defense they desire. In *Gilmore v. Taylor,* 508 U.S. ___, 113 S. Ct. 2112, 2118 (1993), the defendant argued that the trial court's instructions regarding the affirmative defense of sudden and provoked passion prevented the jurors from considering evidence of his affirmative defense. 113 S. Ct. at 2118. This Court rejected this argument, stating:

> The most that can be said of the instructions given at respondent's trial is that they created a risk that the jury would fail to consider evidence that related to an affirmative defense, with respect to which *Winship's* due

process guarantee does not apply. See *Martin v. Ohio, supra; Patterson v. New York, supra.*

Id. Justice O'Connor's concurrence noted, "The State is not required to allow the defense of sudden and unprovoked passion at all, and the State is free to allow it while requiring the defendant to prove it." 113 S. Ct. at 2122.

This Court has repeatedly held that the states can require the defendant to bear the burden of proving affirmative defenses provided by state law. *Martin v. Ohio*, 480 U.S. 228, 236 (1987) (no violation of due process to place burden of proving self-defense on defendant even though the evidence may negate certain elements on which the state has the burden of proof); *Patterson v. New York,* 432 U.S. 197, 206–07 (1977) (no violation of due process to require defendant to prove affirmative defense of extreme emotional disturbance by a preponderance of the evidence); *Leland v. Oregon,* 343 U.S. 790, 798–99 (1952) (state may place burden on defendant of proving insanity beyond a reasonable doubt). Furthermore, this Court has recognized that entrapment is not a constitutionally-mandated defense. *United States v. Russell,* 412 U.S. 423, 430–32 (1973). As this Court said in *Mathews v. United States,* 485 U.S.

58, 63 (1988) "a defendant is entitled to an instruction as to any *recognized* defense for which there exists evidence sufficient for a jury to reasonably find in his favor." (Emphasis added.)

Accordingly, Respondents were not entitled to assert a good-faith defense because the federal constitution does not mandate that such defense be recognized by the states.

To make state recognition of good-faith defenses a requirement of federal constitutional law also is contrary to a second principle of law, which is that ignorance or mistake of the law is no defense. "The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system." *Cheek*, 498 U.S. at 199. As noted in *Ratzlaf*, the principle may be displaced, but only when the legislature intends the contrary. 114 S. Ct. at 663.

The intent of the Arizona legislature on this point is clear. Rather than recognizing good-faith defenses of the type asserted by Respondents, Arizona statutory law expressly precludes them. A.R.S. § 13-204(B) provides that "Ignorance or mistake as to a matter of law does not relieve a person of criminal responsibility."

A.R.S. § 13-105(6)(b) provides that, "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of the statute using such word and does not require any knowledge of the unlawfulness of the act or omission.

Cheek is the *only authority* cited on this issue by the Arizona Court of Appeals' opinion. *Cheek* is not applicable to Arizona law because it involves a question of *statutory interpretation* of the much differently worded federal failure-to-file statute, 18 U.S.C § 7203. This Court has not considered whether *Cheek* applies to state tax prosecutions. Moreover, the dicta in *Cheek* regarding the Sixth Amendment has spawned confusion, as shown by this case, whether *Cheek* has constitutional underpinnings or is strictly an interpretation of federal law.

CONCLUSION

For all of the above-stated reasons, the State of Arizona respectfully requests this Court to grant this certiorari petition to address the interesting and fundamental issues of federal constitutional law presented by this case and to vacate the portions of the Arizona Court of Appeals' opinion that apply *Lambert* and *Cheek* to state tax prosecutions.

Respectfully submitted,

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APPENDIX A

[Filed March 8, 1994]

In the Court of Appeals
State of Arizona
Division One

STATE OF ARIZONA,	)	1 CA-CR 92-0557
	)	1 CA-CR 92-0558
Appellee,	)	(Consolidated)
	)	
	)	DEPARTMENT D
v.	)	
	)	
SHIRLEY AVERYT and ROBERT AVERYT,	)	O P I N I O N
	)	
	)	
Appellants.	)	
	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR 91-07655

The Honorable Michael D. Ryan, Judge

REVERSED AND REMANDED

Grant Woods, Attorney General
by Paul J. McMurdie, Chief Counsel
Criminal Division
and
Jon G. Anderson, Assistant Attorney General
Attorneys for Appellee — Phoenix

Barry Becker
Attorney for Appellants — Phoenix

Burch & Cracchiolo, P.A.
by Stephen E. Silver and Stephen M. Hart
Attorneys for *Amicus Curiae* Phoenix

G E R B E R, Judge

Shirley and Robert Averyt (the Averyts) were found guilty by a jury of three counts of failure to file an Arizona income tax return for the years 1987, 1988, and 1989, class 5 felonies, in violation of Ariz. Rev. Stat. Ann. ("A.R.S.") section 42-137 (B)(4). After granting the state's motion to dismiss the allegation of *Hannah*[1] priors, the trial court placed the Averyts on probation for three years and imposed one-year, flat-time jail terms as a condition of probation. On appeal, the Averyts challenge the constitutionality of the statute supporting their convictions. They also challenge the trial court's ruling regarding the elements of the crime charged. In this opinion, we hold that the statute is constitutional; however, we find that the trial court erred in failing to instruct the jury on an essential element of the offense. We therefore reverse the convictions and sentences and remand for a new trial.

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[1] *State v. Hannah*, 126 Ariz. 575, 617 P.2d 527 (1980)

BACKGROUND

In February 1991, the Arizona Department of Revenue ("ADOR") began investigating the Averyts regarding their failure to file state income tax returns for 1987, 1988, and 1989. The Averyts were interviewed by two ADOR criminal investigators. Mr. Averyt admitted that the couple did not file returns for 1988 and 1989; however, he thought that they had filed a return for 1987. Mrs. Averyt told investigators that she knew that they had not filed returns for the three years in question. She stated that she was responsible for keeping the couple's tax records, while Mr. Averyt was responsible for the actual completion and filing of the returns. The Averyts claimed during their interviews that they had been involved in several complicated real estate transactions in 1988 and 1989 and did not know how to prepare the returns for those years. Mr. Averyt told the investigators that he did not have the money to hire an accountant to prepare the returns.

Prior to trial, the Averyts filed a motion to dismiss the indictment. They claimed that because they subsequently filed their delinquent tax returns, the criminal violations had been cured. They

also claimed that if the statute did not allow such a cure, that it was unconstitutionally vague for failing to specify the date upon which criminal liability commences. The trial court denied the motion. the court noted that A.R.S. section 43-325 requires income tax returns to be filed by April 15. It found that the Averyts' criminal liability therefore commenced on April 16. The court further found that A.R.S. section 42-137(B)(4), when read in context with A.R.S. section 43-325, provided adequate notice and was not unconstitutionally vague.

The prosecutor filed a motion in limine prior to trial in which he sought to preclude both the testimony of a defense expert and the introduction of the Averyts' tax returns for 1987, 1988, and 1989. The Averyts sought to introduce the expert's testimony and the returns in support of their position that they believed their duty to file tax returns required that they file only accurate tax returns; until they could file accurate returns,they felt that they did not have a duty to file. They contended that the testimony of the expert witness and the copies of their tax returns were necessary to demonstrate the legitimacy of this belief to the jury.

The prosecutor argued that, under Arizona law, the state has no duty to prove that the Averyts knew they had a legal duty to file their tax returns. The prosecutor maintained that the proffered evidence therefore was irrelevant. The trial court agreed and granted the state's motion to preclude the evidence.

After hearing the testimony of the two ADOR investigators, the jury returned guilty verdicts on all counts.

The Averyts raise two issues in this consolidated appeal:

1) Is A.R.S. section 42-137(B) unconstitutionally vague?

2) Did the trial court err in its jury instruction regarding the elements of the crime?

DISCUSSION

I. Constitutionality of the Statute

The Averyts contend that the statute under which they were convicted, A.R.S. section 42-137(B), is susceptible to more than one interpretation. They assert that the statute is unconstitutionally vague regarding the point in time at which criminal liability attaches and regarding the element of intent. We disagree.

In analyzing such a challenge, this court is required to construe the statute so that, if fairly possible, it will be constitutional. *Schecter v. Killingsworth*, 93 Ariz. 273, 282, 380 P.2d 136, 142 (1963). A penal statute will be held to be vague if "it fails to give persons of average intelligence reasonable notice of what behavior is prohibited . . . ." *State v. Steiger*, 162 Ariz. 138, 141, 781 P.2d 616, 619 (App. 1989). The due process requirement of a fair and definite warning, however, does not mandate absolute precision. *Id.*

When Criminal Liability Attaches

Prior to trial, the Averyts filed a motion to dismiss the indictment. They claimed that the failure of A.R.S. section 42-137(B)(4) to expressly set forth the date upon which criminal liability attaches indicates that the legislature intended to allow taxpayers the opportunity to unilaterally terminate a criminal prosecution by filing their returns at any time prior to conviction. Such a construction, however, effectively renders the statute a nullity. *See State v. Crisp*, 175 Ariz. 281, 282-83, 855 P.2d 795, 796-97 (App. 1993)(appellate court will presume the validity of an

ordinance unless it clearly appears otherwise); *see also State v. Cook*, 139 Ariz. 406, 408, 678 P.2d 987, 989 (App. 1984) (under the rules of construction there is a presumption in favor of constitutionality). Furthermore, this contention can only be supported by reading the statute in a vacuum, without regard to the tax code as a whole.

Title 42 of the Arizona Revised Statutes sets forth the provisions governing the tax laws in general. A.R.S. § 42-101 to -1836. Title 43 sets forth the provisions governing the taxation of income by the state. A.R.S. § 43-101 to -1413. The time for filing state income tax returns is set forth within A.R.S. section 43-325 as follows: "*Unless otherwise indicated*, returns made on the basis of the calendar year shall be filed on or before the fifteenth day of April following the close of the calendar year." (Emphasis added.)

The provisions governing criminal violations of the tax law are set forth under the general administrative provisions of the code within A.R.S. section 42-137. Subsection B of this statute, under which the Averyts were convicted, provides in pertinent part: "It is

a class 5 felony to . . . [k]nowingly fail to file a return or supply required information . . . ." Because a different filing date is not "otherwise indicated" within the A.R.S. section 42-137(B)(4), the filing date expressly set forth within A.R.S. section 43-325 applies. *See Redewill v. Superior Court*, 43 Ariz. 68, 75-76, 29 P.2d 475, 478 (1934) (where there is a general statute on a subject and another dealing with a part of the same subject, it is a general rule of construction that the two shall be read together and harmonized to give full effect to legislative intent).

The Averyts argue that the placement of the statute governing criminal violations for the failure to file a return within Title 42 violates the notice requirements of due process because a person who seeks information on all of the statutes regarding Arizona income tax would turn only to Title 43, where he would find no provisions governing the criminal consequences of his failure to file his income tax return. This argument is without merit.

The table of contends of Title 43 directs the reader to chapter 8 for a review of the statutes governing interest and penalties for income tax violations. A review of chapter 8 in the supplement to

Title 43 clearly informs the reader that the penalty sections have been repealed and lists the cross-references for the new sections by section within Title 42. A.R.S. § 42-842 (Supp. 1993).

In sum, A.R.S. sections 42-137 and 43-325(B)(4), read together, give fair warning that the knowing failure to file a tax return on or before the fifteenth day of April following the end of the calendar year subjects one to criminal liability. Thus, the failure to file statute is not vague with respect to when criminal liability attaches.

Vagueness of the *Mens Rea* Requirement

As an alternative argument, the Averyts contend that the mental state of "knowingly" required by A.R.S. section 43-325(B)(4) is ambiguous unless equated with the definition of "willfully" in the federal tax code. They allege that, in the absence of such an interpretation, the statute criminalizes seemingly innocent or merely negligent omissions. They present several hypothetical situations in support of this argument.

We need not consider whether the statute is vague when applied to these hypothetical situations because the Averyts have no

standing to assert such claims. *See State v. Duran*, 118 Ariz. 239, 244, 575 P.2d 1265, 1270 (App. 1978) (one whose conduct falls squarely within the clearly defined core of a statute may not complain that the statute might be vague when applied to others); *State v. Steiger*, 162 Ariz. at 144, 781 P.2d at 622 (litigant whose conduct falls clearly within a statute's legitimate scope may still have standing to challenge its constitutionality, but only where the statute is alleged to intrude upon first amendment protections).

The principal rule of statutory construction requires the court to interpret and give meaning to legislative intent. *State v. Fendler*, 127 Ariz. 464, 473, 622 P.2d 23, 32 (App. 1980), *cert. denied*, 452 U.S. 961 (1981). The words used by the legislature will be given their plain and ordinary meaning unless the context requires a different meaning. *Id.* The United States Supreme Court has long recognized that an otherwise vague and indefinite statute may be saved by requiring proof of a specific intent to do a prohibited act. *E.g., Screws v. United States*, 325 U.S. 91, 101 (1945). However, when the penalty prescribed is "for an act knowingly done with the purpose of doing that which the statute prohibits," the accused

cannot complain that he lacked sufficient warning that his conduct would amount to a violation of the law. *Id.* at 102.

With respect to the statute under consideration, the legislature has enacted several modifications over the past fifteen years. Prior to 1978, A.R.S. section 43-179(f), one of the predecessors to A.R.S. section 43-137(B)(4), provided as follows:

> (f) Failure to file or supplying false information -- intent to evade. Any person who, within the time required by or under the provisions of this title, **willfully** fails to file any return or to supply any information **with intent to evade** any tax imposed by this title . . . is punishable by imprisonment in the county jail not to exceed one year, or in the state prison not to exceed five years, or by fine of not more than five thousand dollars, or by both such fine and imprisonment, at the discretion of the court.

Act of June 9, 1978, ch. 201, § 783, 1978 Ariz. Sess. Laws 940. (Emphasis added.)

When the 1978 legislature undertook a major revision of the criminal code and several other statutes relating to crimes and offenses, A.R.S. section 43-179(f) was modified and renumbered as follows:

> (e) Failure to file or supplying false information -- intent to evade. Any person who, within the time required by or under the provisions of the title,

> **knowingly** fails to file any return or to supply any information **with intent to evade** any tax imposed by the title . . . is guilty of a class 6 felony. (Emphasis added.)

Acts of June 9, 1978, ch. 201, §783, 1978 Ariz. Sess. Laws 940. (Emphasis added.)

One week after the enactment of the above-referenced act, the legislature passed the Arizona Income Tax Act of 1978, which amended several provisions of Title 43. Act of June 17, 1978, ch. 213, §2, 1978 Ariz. Sess. Laws 1085. However, with regard to A.R.S. section 43-179(e), the Income Tax Act of 1978 did not change the wording of that provision, but only renumbered it as A.R.S. section 43-842. *Id.* at 1123-24.

The provision under which the Averyts were convicted was enacted in 1985 when the legislature significantly revised the tax code under Titles 42 and 43. 1985 Ariz. Sess. Laws 1462-64. At that time, A.R.S. section 43-842 was repealed and replaced with A.R.S. section 42-137(B)(4) as follows:

> B. It is a class 5 felony to:
>
> 4. **Knowingly fail to file a return or supply required information**, or falsify or conceal a material fact, document or record, make a false,

> fictitious or fraudulent statement or representation or make or use a false writing or document knowing it to contain a false, fictitious or fraudulent statement or entry, with intent that the department rely on the false, fictitious or fraudulent statement or entry in determining tax liability under this article. (Emphasis added.)

Id. at 1488. (Emphasis added.)

Under the rules of statutory construction, when the legislature modifies the language of a statute, there is a presumption that a change in the existing law was intended. *See State v. Bridgeforth*, 156 Ariz. 60, 63, 750 P.2d 3, 6 (1988) (statutory amendment eliminating phrase "and intentionally" shifted focus of culpable mental state from knowing and intentional to that of knowledge only). When the legislature revised the failure to file provision in 1978, it replaced the culpable mental state of "willfully" with the mental state of "knowingly." *See* A.R.S. § 43-179(e) (formerly A.R.S. § 43-179(f), later renumbered as A.R.S. § 43-842). In the minutes of the Judiciary Committee meeting on the bill, two of the committee members noted that the changes in mental state from "willfully" to "knowingly" in several of the statutes would simplify prosecution under those statutes. *Hearings on H.B. 2025 before the*

Judiciary Committee, 33d Leg., 2d Reg. Sess. (1978) (committee minutes Jan. 24, 1978).

As part of the 1985 revision, the legislature omitted the requirement of a specific intent to evade any tax imposed by law. In addition, the felony designation was elevated from a class 6 felony to a class 5 felony. *See* A.R.S. § 42-137(B)(4) (formerly A.R.S. § 43-842). The Averyts and counsel for *amicus curiae* argue that the legislature's omission of the "intent to evade" was somehow accidental and unintentional, and thus, this court should hold that the scienter requirements under A.R.S. section 42-137(B)(4) remain the same as those of former A.R.S. section 43-842.

To interpret the statute in such a way would exceed our authority because it would require us to reinsert words of limitation which the legislature has expressly omitted. *See State v. Steiger*, 162 Ariz. at 146, 781 P.2d at 624. By reintroducing a specific intent to evade the payment of a tax, we would be encroaching upon the legislature's power to define the acts that constitute crimes. *Id.* The statute, as amended, still requires proof of a "knowing" mental

state and is therefore not an improper strict liability crime for which the court would have to infer the element of scienter. *See State v. Mincey*, 115 Ariz. 472, 478, 566 P.2d 273, 279 (1977), *rev'd on other grounds, Mincey v. Arizona*, 437 U.S. 385 (1978) (the established rule, with few exceptions, prohibits criminal punishment without wrongful intent); *see also State v. Crisp*, 175 Ariz. 281, 283, 855 P.2d 795, 797 (App. 1993) (when a criminal statute fails to expressly state a *mens rea*, this court may infer the scienter requirement from the words of the statute and the intent of the legislature). We conclude that A.R.S. section 42-137(B)(4) is not vague or ambiguous with regard to the mental state required for its violation.

II. Jury Instructions on the Elements of the Offense

The Averyts contend that the trial court erred in limiting the scope of the applicable mental state contained within A.R.S. section 42-137(B)(4) such that the state was required to prove only that the defendants knew they had not filed tax returns by April 15. They further argue that by so limiting the element of intent, the court improperly restricted the available defenses to the crime.

The state contends that Arizona law, unlike federal law, does not require the state to prove that the Averyts knew of their legal duty to file a tax return but only that they knew they had failed to file a particular return. We disagree. We need not rewrite the statute, however, nor attempt to harmonize it with a dissimilar federal provision as the Averyts and *amicus curiae* have urged us to do.[2]

A fundamental principle of criminal law prohibits conviction of evil thoughts alone. There must be an act or an omission to act before a criminal penalty may be imposed. *State v. Dale*, 121 Ariz. 433, 434, 590 P.2d 1379, 1380 (1979). In order for an omission to act to be a crime, however, there must exist a duty to act imposed by law. *State v. Angelo*, 166 Ariz. 24, 27, 800 P.2d 11, 14 (App. 1990). The United States Supreme Court long ago confirmed that

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[2] Internal Revenue Code section 7203 (1988) provides in pertinent part:

> "Any person required . . . to make a return, keep any records, or supply any information, who willfully fails to . . . make such return, keep such records, or supply such information . . . shall . . . be guilty of a misdemeanor . . . ." (Emphasis added.)

notice is ingrained in the notion of due process and is required in situations in which punishment could be imposed for the mere failure to act. *Lambert v. California*, 355 U.S. 225, 228 (1957).

In *Lambert*, the court confronted a Los Angeles, California ordinance making it unlawful for any convicted felon to remain in the city for more than five days without registering with the police. *Id.* at 226. The court held that for such a conviction to comport with due process, the state must prove that the accused had or probably had actual notice of the duty to register. *Id.* at 229. This court has applied the same *Lambert* rationale to failure to register as a sex offender, holding that in cases of wholly passive conduct, arising only from a duty imposed by statute, the defendant's knowledge of that statutory duty must be established. *State v. Garcia*, 156 Ariz. 381, 382, 752 P.2d 34, 35 (App. 1987); *cf. State v. Morgan*, 167 Ariz. 463, 465, 808 P.2d 348, 350 (App. 1991) (duty to return rental property does not arise only from a statute but arises also from the rental relationship itself, thus the defendant's knowledge of the duty was not an element for the state to prove).

In the present case, both the duty to file state income tax returns and the duty to pay income taxes to the state arise strictly from statute. A.R.S. §§ 43-102(A)(4) and 43-301 (Supp. 1993). In the absence of these statutes, earning an income and keeping all of those earnings for one's own use, by themselves, would not normally alert a person to any negative consequences. *See Lambert*, 355 U.S. at 228. We hold that a conviction of the crime of failure to file a state income tax return cannot be sustained without proof of the defendant's knowledge of his duty to file such return.

The trial court here instructed the jury on the elements of the offense as follows:

> Elements of the crime: On counts I, II and III, the crime of failing to file Arizona personal income tax returns requires proof of the following:
>
> 1. A defendant earned at least $5,000 gross income in Arizona for the tax year; and
>
> 2. The defendant failed to file an Arizona personal income tax return by April 15th of the year following the tax year; and
>
> 3. The failure to file an Arizona personal income tax return was done knowingly.
>
> The State is not required to show that tax is due and owing to prove this offense.

The instruction given was incomplete and hence incorrect because the jury was not told that the element of knowledge applied to both the element of the failure to file and the element of the duty to file. An instruction that omits an element of the offense charged is not "substantially free from error," and cannot be said to have properly reflected the correct law. *Cf. State v. Walton*, 159 Ariz. 571, 584, 769 P.2d 1017, 1030 (1989), *aff'd Walton v. Arizona*, 497 U.S. 639 (1990) (defendant suffers no prejudice when instructions, read as a whole, adequately reflect the law and are substantially free from error), *quoting State v. Norgard*, 103 Ariz. 381, 383, 442 P.2d 544, 546 (1968).

The due process clause protects a defendant against conviction for a criminal offense "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Without the proper instruction, the prosecutor was relieved of the burden of proving the Averyts' knowledge of their duty to file state tax returns. Such an error cannot be considered harmless, and the convictions must be reversed.

Furthermore, upon a retrial of the case, the Averyts must not be precluded from presenting evidence in support of their defense that their knowledge of the duty to file tax returns was flawed. Preventing the jury from considering evidence which might negate the *mens rea* of the crime would seriously undermine the protections embodied within the sixth amendment's jury trial provision. *See Cheek v. United States*, 498 U.S. 192, 203 (1991) (jury instruction which prevented the jury from considering evidence of defendant's belief that he had no duty to file a tax return because he did not believe that wages were taxable income was error).

It is not beyond the realm of possibility "for a defendant to be ignorant of his duty based on an irrational belief that he has no duty." *Id.* Because knowledge and belief are questions for the finder of fact, it is error to prevent a defendant from presenting evidence which could raise a reasonable doubt as to an element of the offense. *Id.* Assessing the credibility of such a belief is for the jury to decide. "The more unreasonable the asserted beliefs . . . the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax

laws and will find that the Government has carried its burden of proving knowledge." *Id.* at 203-04.

CONCLUSION

For the foregoing reasons, the convictions and sentences imposed upon Shirley and Robert Averyt are reversed. The cases are remanded for proceedings consistent with this opinion.

s/R. Gerber
Rudolph J. Gerber, Judge

CONCURRING:

s/ John L. Claborne
John L. Claborne, Presiding Judge
Department D

s/ Ruth V. McGregor
Ruth V. McGregor, Judge

(4675-1)

APPENDIX B

SUPREME COURT OF ARIZONA

STATE OF ARIZONA, Appellee, vs. SHIRLEY AVERYT and ROBERT AVERYT, Appellants.	)	Supreme Court No. CR-94-0181-PR Court of Appeals Nos. 1 CA-CR 92-0557 and 1 CA-CR 92-0558 [Consolidated] Maricopa County No. CR 91-07655 O R D E R

It appearing to the Court that the grant of review in this case was improvident,

IT IS ORDERED that the order granting review is vacated.

IT IS FURTHER ORDERED that the petition for review is denied.

Dated this 4th day of November, 1994.

s/ Stanley G. Feldman
STANLEY G. FELDMAN
Chief Justice

TO:

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